

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 24

Docket No. SF-0752-09-0667-I-1

**Keith A. Bohannon,
Appellant,
v.
United States Postal Service,
Agency.**

February 15, 2011

Karen A. Bohannon, Los Angeles, California, for the appellant.

Geraldine O. Rowe, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision dismissing his appeal as moot. We find that the petition for review does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. We REOPEN this case on our own motion under [5 C.F.R. § 1201.118](#), however, REVERSE the initial decision, and remand the appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a preference eligible Mail Processing Clerk at the agency's Los Angeles Processing and Distribution Center (LA PDC). Initial Appeal File (IAF), Tab 18; Electronic Hearing Transcript (HT) at 8-9 (stipulation). In 1998, he suffered a compensable injury in his previous position as a letter carrier. *See* IAF, Tab 8, Subtab 4F; HT at 8-9 (stipulation), 12 (testimony of the appellant). At some point following his 1998 injury, the appellant was reassigned to his current position of record. *See* IAF, Tab 18; HT at 9 (stipulation). In April 2008, the appellant was offered and accepted a modified clerk assignment/rehabilitation position working on "waste mails" and repairing damaged mail, for 4 hours each per day. IAF, Tab 8, Subtab 4F at 14-15; HT at 14-15 (testimony of the appellant), 142 (testimony of Brigitte Richards, Supervisor, Distribution Operations).

¶3 In 2007, the agency's Los Angeles District, of which the LA PDC is a part, began to participate in the agency's National Reassessment Process (NRP). IAF, Tab 8, Subtab 4E at 1 (Declaration of Koula Fuller, Postmaster, Beverly Hills, CA Post Office). Under the NRP, supervisors and managers of employees performing limited duty review those employees' assignments to ensure that they are consistent with the employees' medical restrictions and contain only operationally necessary tasks. *Id.*; HT 180 (testimony of Fuller). If a limited duty assignment does not meet these criteria, the NRP prescribes procedures for identifying and offering alternative limited duty assignments that do meet the criteria. IAF, Tab 29 at 61-64. If the supervisor or manager is unable to identify any operationally necessary tasks available within the employee's work restrictions, the employee will be sent home until such work becomes available or his medical restrictions change. *Id.* at 59, 61-62. During the employee's

absence, he will account for work hours through the use of approved leave, leave without pay, or a continuation of pay.¹ *Id.* at 59, 62.

¶4 On May 1, 2009, the agency issued the appellant a letter stating in relevant part that, because there was no operationally necessary work available for the appellant within his medical restrictions and within his regular duty hours at the LA PDC, the appellant should not report for duty unless he was informed that such work was available. IAF, Tab 2 at 9; HT at 129-31 (testimony of Richards). During this absence, the agency directed the appellant to account for his work hours through the use of leave or continuation of pay. IAF, Tab 2 at 9.

¶5 The appellant then filed an appeal, challenging his placement off duty and requesting a hearing. *Id.* at 3-8. The matter was docketed as an appeal of an alleged constructive suspension of more than 14 days under MSPB Docket No. SF-0752-09-0667-I-1. IAF, Tab 3. The appellant further claimed that the agency's action constituted age and disability discrimination, in that the agency allegedly failed to provide him with a reasonable accommodation; it repeatedly requested updated medical documentation concerning his permanent disability; and it subjected only disabled employees who were deemed to have reached maximum medical improvement, but not other injured employees, to the NRP process. *Id.*, Tab 25 at 6-10, *see* IAF, Tab 35 at 6-7 (summary of prehearing conference identifying issues to be heard).

¶6 The regional office also docketed a second appeal, MSPB Docket No. SF-0353-09-0666-I-1, to address the appellant's claim that the agency beginning May 1, 2009, arbitrarily and capriciously failed to restore him to duty following a compensable injury. IAF, Tab 44, Initial Decision (ID) at 1 n.1. The appeals were joined for processing but were subsequently severed for decision. IAF, Tabs 12, 44, ID at 1 n.1. The restoration appeal was thereafter dismissed without

¹ The right to continuation of pay is governed by 20 C.F.R. part 10, subpart C.

prejudice pending the outcome of the instant petition for review. *Bohannon v. U.S. Postal Service*, MSPB Docket No. SF-0353-09-0666-I-1, slip op. at 3 (Initial Decision, Feb. 11, 2010). Thus, the instant appeal does not involve the merits of the appellant's restoration claim. ID at 14 n.9.

¶7 The agency subsequently filed a motion to dismiss the appeal based on a September 11, 2009 letter which advised the appellant that its May 1, 2009 letter discussed above was rescinded effective September 11. IAF, Tab 16 at 2-3. The agency renewed its dismissal request in a second motion, claiming that the appeal was moot because the appellant had been made whole for all lost back pay and unearned leave following its May 1 action. IAF, Tab 19. The appellant opposed the agency's motion on the grounds that he had not received all the back pay, premium pay, and night differential pay that he was entitled to receive, and that he had not been returned to duty following the September 11 rescission notice. *See id.*, Tab 25 at 2-6. Regarding the latter contention, the appellant stated that, when he reported for duty on September 16, 2009, the agency issued him a new letter stating that it had been unable to identify sufficient operationally necessary tasks within his medical restrictions and was therefore again placing him in a non-duty status. *Id.* at 2, Exhibit B.

¶8 The administrative judge, stating that it remained unclear whether the agency had completely rescinded its May 1 action, and noting that the appellant had requested compensatory damages in connection with his disability discrimination claims, convened a hearing on November 20, 2009. *See* ID at 2. Thereafter, the administrative judge issued an initial decision in which she found that the Board had jurisdiction over the appeal as a constructive suspension for more than 14 days because the agency had placed the appellant on enforced leave, he had to use his accrued annual or sick leave or leave without pay for a portion of his shift on May 1, and continuing through May 28, 2009, and the agency did

not rescind its May 1 action prior to the appellant's filing of the instant appeal.² ID at 7-8. The administrative judge dismissed the appeal as moot, however, finding that the agency had completely rescinded the constructive suspension after the appellant filed his appeal by restoring him to the status quo ante with regard to the back pay and leave owed to him for the period from May 1, 2009, to May 28, 2009. ID at 9-12.

¶9 The administrative judge also adjudicated the appellant's disability discrimination claim of failure to provide a reasonable accommodation, recognizing that in cases where an agency adverse action has been rescinded, if the appellant has raised an affirmative defense on which he bases a claim for compensatory damages, the Board retains jurisdiction to adjudicate the affirmative defense. ID at 14-17. In connection with this claim, the administrative judge found that the appellant established that he is an individual with a disability, as he is substantially limited in the major life activities of walking and standing, but that he failed to show that he could perform his position with or without reasonable accommodation and that he had not identified any other vacant funded position, the duties of which he could perform with or without reasonable accommodation.³ ID at 16-17. The administrative judge declined to consider the appellant's age discrimination claim, however, because

² The administrative judge rejected the appellant's contention that the constructive suspension continued beyond May 28, stating that, for purposes of Board jurisdiction under [5 U.S.C. § 7501](#)(2), a suspension involves the placement of an employee in a temporary status without duties *and* without pay, and the agency had established that the appellant was placed on administrative leave -- a non-duty status with pay -- beginning May 29, 2009. ID at 8-9.

³ As discussed below, the initial decision does not address the appellant's other claims that the agency improperly made repeated requests for medical documentation concerning his disability, or that the NRP process unlawfully discriminated against permanently disabled employees.

no damages were available in connection with such a claim. ID at 14-15. Thus, she concluded that, because the appellant had failed to prove his claim of disability discrimination on the basis of a failure to reasonably accommodate, he had received all of the relief to which he was entitled, and the agency's rescission of the constructive suspension therefore rendered the appeal moot. ID at 17.

¶10 In his timely filed petition for review, the appellant contends that the agency had not completely rescinded its suspension action at the time the administrative judge dismissed the appeal because he had not received finalized payment of the amount owed him and a "reconciliation report." Petition for Review (PFR) File, Tab 1 at 6-7. The appellant also asserts that the agency's unilateral rescission of its suspension action did not divest the Board of jurisdiction, that the administrative judge erred in finding that he could not perform the essential duties of his position because he showed that he could perform the modified duties to which he had been assigned, and that there were other vacant funded positions that he could have performed. *Id.* at 7-9. The appellant further asserts that the agency denied him due process when it placed him on administrative leave on May 30, 2009. *Id.* at 8. The agency has not filed a response to the appellant's petition.

ANALYSIS

¶11 Although the administrative judge adjudicated the facts presented by the instant matter as a constructive suspension appeal, the Board recently found that circumstances similar to those present in this appeal do not give rise to a valid constructive suspension claim. *Kinglee v. U.S. Postal Service*, [114 M.S.P.R. 473](#), ¶¶ 16-22 (2010). Instead, the Board held that the appellant's rights and remedies regarding the time when the agency failed to assign him work and required his

absence from duty are subsumed in the restoration appeal process.⁴ *Id.*, ¶ 18. The Board explained in *Kinglee* that, if the appellant prevails on the merits of the restoration claim, he would be entitled to relief that would address the agency's failure to provide him with the proper hours of work each day (in other words, the constructive suspension claim), but if the Board determines that the agency afforded the appellant the restoration rights to which he is entitled, it would be illogical to then hold that the agency's proper restoration could constitute an improper constructive suspension. *Id.*, ¶¶ 20-21.

¶12 As stated above, the appellant's restoration appeal was joined with the instant appeal for processing, but was severed for decision after the hearing. ID at 1 n.1. In light of the holding in *Kinglee*, however, the appellant's constructive suspension appeal was, in fact, subsumed by the appellant's restoration appeal. Accordingly, the administrative judge should deem the restoration appeal refiled and adjudicate it.⁵

¶13 Furthermore, we find that it is unnecessary to reach the issue whether the administrative judge erred in dismissing the appellant's constructive suspension appeal as moot. Even if the administrative judge erred in so ruling, the appellant's substantive rights were not prejudiced because he would be unable to establish Board jurisdiction over such a claim. *See Kinglee*, [114 M.S.P.R. 473](#),

⁴ The facts of the instant appeal differ slightly from those in *Kinglee* because the appellant in this case was completely out of work for nearly a month while Mr. Kinglee was never out of work entirely, but was given a part-time limited duty assignment under the NRP. *Kinglee*, [114 M.S.P.R. 473](#), ¶¶ 3-4. We assign no significance to the factual differences between the two cases.

⁵ The initial decision dismissing the restoration appeal without prejudice pending the outcome of the instant petition for review reflects the administrative judge's finding that the appellant made the requisite nonfrivolous allegations to establish Board jurisdiction over that appeal under [5 C.F.R. § 353.304\(c\)](#). *Bohannon*, MSPB Docket No. SF-0353-09-0666-I-1, Initial Decision at 1.

¶¶ 16-22 & n.4; *see also* *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).⁶

⁶ In light of our disposition of the appellant's constructive suspension claim, the Board lacks jurisdiction to consider the merits of his discrimination claims in the context of this appeal, and we deem them to be subsumed in the affirmative defenses raised in his restoration appeal. [5 U.S.C. § 7702](#)(a)(1); *see Carlisle v. Department of Defense*, [93 M.S.P.R. 280](#), ¶ 9 (2003). With respect to the reasonable accommodation claim, we note that the appellant's representative suggested during closing arguments that the appellant could be capable of performing the duties of other positions, "such as perhaps a retail mail clerk or other rewrap positions." HT at 230. It is not clear from the record, however, whether the Rewrap Clerk was a vacant, funded position, when, or if, it was rescinded and made part of a bid assignment, whether making the position part of a bid assignment precluded consideration of the appellant to fill it, or whether, if he was considered for the position, the agency had a sufficient reasons for not placing the appellant in the position. Although further development of the record is necessary to ascertain whether placement in that position would constitute a reasonable accommodation, we note that if the appellant is qualified for a vacant position, he is entitled, under the Rehabilitation Act, to be placed in it. *See Taylor v. Department of Homeland Security*, [107 M.S.P.R. 306](#), ¶ 8 (2007). Moreover, in this case, the evidence shows that, at the time the agency placed the appellant in an "off duty" status on May 1, 2009, the agency's job search encompassed only positions in the appellant's facility and on the appellant's tour; the agency did not search for positions within the facility but outside the appellant's tour until September 29, 2009. IAF, Tab 29 at 7 of 73. The record also indicates that the agency's efforts to search for work outside of the appellant's facility and outside of his craft were still in progress at the time of the hearing and that the agency was about to undertake a search in a 50-mile radius of the appellant's work location. HT at 133 (testimony of Richards), 220 (testimony of Fuller). On remand, the administrative judge shall oversee further development of the record by the parties, including an opportunity for discovery by the parties and a supplemental hearing. *See Sanchez v. U.S. Postal Service*, [114 M.S.P.R. 345](#), ¶ 19 (2010). The administrative judge should take into consideration the results of the interactive process required to determine an appropriate accommodation. *See Paris v. Department of the Treasury*, [104 M.S.P.R. 331](#), ¶ 17 (2006); [29 C.F.R. § 1630.2\(o\)\(3\)](#); *see also EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, www.eeoc.gov/policy/docs/accommodation.html at 6.

ORDER

¶14 Accordingly, we REMAND this appeal for further development of the record and issuance of a new initial decision consistent with this Opinion and Order. The appellant's constructive suspension matter shall be consolidated with the appellant's refiled restoration appeal, MSPB Docket No. SF-0353-09-0666-I-1. No further action is required with respect to the constructive suspension allegation because that issue is subsumed in the restoration claim. *Kinglee*, [114 M.S.P.R. 473](#), ¶ 23.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.